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IN THE

Supreme Court of the United States

October Term, 1967
No. 991

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,
Deceased.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

SUPREME COURT OF CALIFORNIA,
Respondent.

SUPREME COURT OF CALIFORNIA, MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, ROLAND MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Real Parties in Interest.

BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,
Respondents.

Brief for Respondents in Opposition.

I.
QUESTIONS ACTUALLY PRESENTED BY THE PETITION.

1. Whether a substantial federal question was presented to a state court in a timely and proper manner and there preserved as an issue.
2. Even assuming that a substantial federal question was properly raised, whether it was necessary for the state court to determine such a question.
3. Whether, in any event, the dismissal of petitioner's post-probate will contest was consonant with existing federal constitutional principles justifying legislation such as Section 2034 of the California Code of Civil Procedure, as written, or as applied to the facts of the case at bar.

II.
STATEMENT.

It is necessary for respondents to set forth in some detail the facts as established by the record because of the confusing and unsubstantiated statements made by petitioner in his Petition for Writ of Certiorari which may give this Court a serious misimpression of the case.

A. The Background Facts.

Marcellus L. Joslyn died on June 30, 1963, in the County of Los Angeles. His descendants included four children and fifteen grandchildren. One of his children is the petitioner, Marcellus N. Joslyn. His probate estate, before taxes, approximated $15,000,000.00. With the exception of his household and personal effects, he left the great residue of his estate to his fifteen grandchildren to be held in trust for them and their de-

scendants. *Ample provision had previously been made for all of the children, including the petitioner, through the establishment of inter-vivos trusts and the testamentary trust to the decedent's wife, Alice N. Joslyn.*

As early as 1935, the decedent and his wife established two *inter-vivos* trusts which regularly distributed large sums of income to the children. Following the death of Alice N. Joslyn in 1949, a testamentary trust was created by the terms of her will which substantially augmented the income being received by the children. From these sources the petitioner had been receiving in excess of $100,000.00 annually, and the income has been consistently increasing to the point where currently the petitioner has been receiving in excess of $225,000.00 per year.

Having already provided for the care and comfort of his children, the decedent, for state and federal tax reasons and other considerations, decided to bypass the children in favor of the grandchildren, including the children of the petitioner.[1]

For reasons which have not been made clear, the petitioner remained estranged from the rest of his family and did not in fact visit with the decedent for a period exceeding ten years prior to the decedent's death. The petitioner maintained his residence in Texas, while the decedent and other relatives resided in California

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[1]While it is true, as petitioner states, that Robert D. MacDonald was a business associate and tax advisor of the decedent, Marcellus L. Joslyn, it is not true that he receives 3% of the trust estate as petitioner implies. Petition for a Writ of Certiorari at 4. The Will of Marcellus L. Joslyn, deceased, discloses that Mr. MacDonald receives only 3% of the annual *net* income of the trust estates created by this will as a trustee's fee. *See* Appendix I to Petition to Recall the Remittitur. This fee, of course, is less than that charged by most institutional trustees.

(*See* Declaration of Robert D. MacDonald in Support of Respondents' Motion to Dismiss Appeals in 2nd Civ. No. 31472, at 7-12).[2]

Soon after the decedent's death, the petitioner came to Los Angeles and engaged the services of a firm of attorneys to make an investigation including a review of the decedent's business and personal records. The estate representatives prepared and filed a petition for probate of the will and the hearing on the petition was postponed at the request of the petitioner's attorneys because of the investigation in progress. After the hearing on the petition had been postponed for several weeks, and shortly before the date of hearing, the petitioner's attorneys were discharged or withdrew, and within a matter of hours, another attorney prepared and filed a pre-probate will contest (*See* MacDonald Declaration, *supra,* at 13-15). The contest alleged various grounds for invalidating the will, including alleged conspiracy, fraud and undue influence.

The petitioner soon thereafter secured new counsel (the firm of Hansen & Dolle), and counsel for the proponents of the will scheduled the deposition of the petitioner. The petitioner appeared and was interrogated concerning the allegations he had made in his pre-probate will contest. In all material respects, he admitted that he had no basis in fact for the will contest (*See* Appendix 1 hereto which is a true copy of an excerpt from this deposition as certified within the record in 2nd Civ. No. 31472 and set forth as

[2]All record references herein are to parts of the record certified to the Supreme Court of the United States in Cases Numbered 990, October Term 1967, and 991, October Term 1967.

Exhibit "G" to the "Opposition to Application for Augmentation of Record, etc.").

Soon thereafter, the petitioner discharged the firm of Hansen & Dolle as his counsel of record and thereafter for several months appeared *in propria persona.* The trial of his pre-probate will contest was duly scheduled, but on March 9, 1964, the petitioner appeared, *in propria persona,* before Judge Newcombe Condee, Judge of the Los Angeles Superior Court, and requested a continuance of the trial. The court at that time noted that there were "less than statutory grounds for continuance" but nevertheless granted the continuance "with the understanding that the matter would be tried at that time either with an attorney or in pro per., for the moving party." (*See* Minute Order, Clerk's Transcript, 2nd Civ. No. 31472, at 40).

On March 26, 1964, without notice to opposing parties, the petitioner, *in propria persona,* filed a Request for Entry of Dismissal (*See* Clerk's Transcript, 2nd Civ. No. 31472, at 41). On March 31, 1964, when the contest was called for trial, the clerk informed the trial court that a dismissal had been "filed downstairs" (*See* Reporter's Transcript, Exhibit "F", p. 3 to the Petitioner's Petition filed with the Supreme Court of California, in LA 29505, hereinafter referred to simply as LA 29505).

Initially, the trial court was not inclined to regard the dismissal as effective and directed that the trial proceed as though the petitioner were still a party to the proceeding (*See* Exhibit "F", Petition in LA 29505). The proponents of the will, in accordance with the previous notices of the hearing, proceeded to present proof that the will had been executed by a testator having

testamentary capacity, and that the other prerequisites existed for the execution of a valid will. The contestant remained at the hearing but refused to participate in the proceedings (*See* Exhibit "F", pp. 1, 2, 15, 20, 23, Petition in LA 29505). The trial court found that a *prima facie* showing had been made justifying admission of the will to probate.

Thereafter, before the formal findings and order were signed, the petitioner once again secured new counsel, the firm of Ely, Kadison & Quinn. On April 24, 1964, his new counsel appeared before the trial court (Judge Condee) to discuss the proposed findings and to argue that the dismissal as filed by his client was effective notwithstanding the court's refusal to recognize it as such. The trial court was persuaded to recognize that a voluntary dismissal by the petitioner was proper, leaving open thereby the possibility of a post-probate will contest. By orders made on April 29, 1964, the will was admitted to probate and the dismissal by the petitioner was recognized, *nunc pro tunc,* as having been effective (*See* Clerk's Transcript, 2nd Civ. No. 31472, at 42).

B. Post-Probate Will Contest Proceedings in the Trial Court.

Shortly before the expiration of the six-month period allowed for a post-probate contest, the petitioner filed a contest in the Los Angeles Superior Court in Action No. P-471,032, renewing essentially all of the allegations made in his pre-probate pleading (*Compare* the Contest as reported at 22 of Clerk's Transcript in 2nd Civ. No. 31472 *with* Contest of Will after admission to probate at 44 of the same transcript).

The petitioner in his contest made no allegation concerning the absence of any opportunity to appear and contest the admission of the will to probate. Of course, such an allegation could not be seriously advanced because of his active participation at all stages in the proceedings prior to and at the time of the admission of the will to probate.

Because the petitioner had indicated in the deposition proceeding during the pre-probate period that he was investigating and seeking to secure evidence concerning the validity of the will, the estate representatives considered it a matter of vital concern that further discovery be obtained to determine whether the petitioner had to any extent succeeded in his quest for evidence. Accordingly, during the period from January of 1965 until the eventual dismissal of the post-probate contest in October of 1965, various discovery proceedings were initiated by the estate representatives pursuant to the discovery statutes of the State of California (California Code of Civil Procedure, Sections 2016-2036).

The petitioner's refusal to abide by the discovery statutes has been documented in a summary form in the conclusions of law as formally made and filed by the Los Angeles Superior Court in Action No. P-471,032. These conclusions of law were certified as part of the Clerk's Transcript in 2nd Civ. No. 31472 and, in pertinent part, are as follows:

CONCLUSIONS OF LAW

1. Defendants were entitled to discovery from Contestant in defense of the Amended Will Contest after Probate.

2. All notices pertaining to any discovery matters or hearings in connection therewith were given as required by law or if not so given were waived by Contestant. All rulings in any hearings pertaining to discovery in the Contest after Probate which were required to be incorporated into attorney orders were signed promptly and served on Contestant's attorney within reasonable times prior to the hearings or matters to which they related.

3. Contestant refused willfully and otherwise to obey an Order of this Court fixing the date and time for the taking of his deposition. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

4. Contestant willfully failed to appear at his deposition on September 1 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

5. Contestant willfully failed to appear at his deposition on September 20 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

6. Contestant willfully failed to serve and file answers to properly served interrogatories submitted under Code of Civil Procedure Section 2030. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

7. Contestant refused willfully and otherwise to obey an Order of this Court made under Section 2031 of the Code of Civil Procedure. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii) (Clerk's Transcript, 2nd Civ. No. 31472, at 1172-73).

These conclusions of law were amply supported by detailed findings of fact which have been included as an appendix to this Brief in Opposition. *See* Appendix 2.

The motion to dismiss the post-probate contest which eventually led to the order of dismissal was filed on September 20, 1965, and although initially scheduled, pursuant to an order shortening time of notice, for a hearing on September 24, 1965, was not heard until October 5, 1965 (*See* Appendix D to the Petitions for Writs of Certiorari in Nos. 990 and 991).

On the day prior to the hearing, October 4, 1965, the petitioner's counsel of record at that time, Phill Silver, Esq., filed a declaration which is set forth beginning at p. 761 of the Clerk's Transcript in 2nd Civ. No. 31472. An examination of the declaration will show that while various procedural arguments were advanced concerning whether or not the various discovery orders were effective, at no time did the petitioner's counsel assert that he had (1) no notice or opportunity to prepare to meet the motion to dismiss or (2) that the questions raised in this Court presented a constitutional or federal impediment to the trial court granting the relief requested by the estate representatives, namely, that the contest be stricken because of petitioner's refusal to give a deposition and to abide

by other orders directing the production of evidence pursuant to the California discovery statutes.[3]

The hearing on the motion to dismiss the will contest was held on October 5, 1965, before the Hon. Donald R. Wright, Judge Presiding in Department 4 of the Los Angeles Superior Court. Again, *no question was raised* concerning the constitutional right or power of the Los Angeles Superior Court to grant relief because of the petitioner's failure to abide by the discovery rules. The position as asserted by petitioner's counsel was to the effect that there were various reasons why the orders had not been honored and these reasons were found insufficient by the trial court upon substantial evidence. (*See* Transcript of the hearing on October 5, 1965, incorporated by the petitioner as Exhibit "Q" to his Petition in LA 29505).

The petitioner filed a motion for reconsideration (Clerk's Transcript, 2nd Civ. No. 31472, at 1026 *et seq.*). Again, the constitutionality of Code of Civil Procedure Section 2034 as written, or as applied to the petitioner, *was not placed at issue.*

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[3]The motion to dismiss the post-probate will contest was tried on the *facts* presented to the trial court by way of declaration and affidavit. Petitioner's then counsel filed a lengthy declaration of fact, referenced above. There was opportunity to file *other* declarations before the hearing. Moreover, the petitioner, *himself*, filed a twelve-page affidavit (containing factual assertions) in support of the motion to reconsider the order dismissing the post-probate will contest (Clerk's Transcript, 2nd Civ. No. 31472 at 804). Thus, the statement in the Petitions for Writ of Certiorari before this Court that "no testimony was taken by the trial court at the hearing on the motion to dismiss petitioner's will contest" must be considered intentionally misleading. Under California statutes, affidavits or declarations may be used in support of motions. *See* California Code of Civil Procedure §§ 2009; 2015.5.

C. Post-Probate Will Contest Proceedings in the Appellate Courts (2nd Civ. No. 31472).

Even if a proper federal constitutional question had been asserted before the trial court, the subsequent developments before the California Court of Appeal have provided an independent state ground barring the petitioner from relief.

During the period from October to December of 1965, the findings of fact and conclusions of law were being settled by the trial court and, on December 16, 1965, the order of dismissal was embodied in a written order signed by Judge Wright of the Los Angeles Superior Court (*See* Appendix 2 hereto). From December of 1965 until January of 1967, there was a period of delay while the record on appeal was being prepared. Because of the many changes of counsel by the petitioner and his alternate status *in propria persona,* there evidently was considerable confusion in the Superior Court Clerk's Office and this apparently caused a delay in the preparation of the record. In any event, the record on appeal was ready for filing before the Court of Appeal in January of 1967. Petitioner's counsel at that time, who was not officially of record before the Court of Appeal, was given an informal notice by counsel for the estate, while at the same time the Clerk's Office was sending official notices to the mailing address listed by the petitioner in representing himself (*See* Exhibit "A" to "Opposition to Application for Augmentation of Record, etc.").

Under the California Rules of Court (Rules 16 and 17 - Appendix 4 hereto), an appellant's opening brief is due within thirty days after the record has been filed. On or about April 24, 1967, a motion to

dismiss petitioner's appeal in 2nd Civ. No. 31472 was filed with the Court of Appeal, Second Appellate District, State of California. This motion, listing seven grounds, was based primarily on petitioner's failure to proceed diligently in prosecuting his appeal, including his failure to file an opening brief within the required time and his failure to indicate that he had made any effort to prepare such a brief in the period of over a year since the notice of appeal was filed. Other grounds for this motion included failure to properly pay the filing fee or seek appropriate relief therefrom and the lack of substantial evidence of any cause of action as evidenced by petitioner's admissions and his conduct in the trial court. (*See* Motion to Dismiss Appeals in 2nd Civ. No. 31472).

Petitioner was, at this time, *in propria persona,* with regard to this appeal, but was represented by counsel in other matters. Respondents, consequently, served the motion to dismiss with related papers on both the petitioner and his then counsel. Petitioner was thus aware of the pendency of this proceeding because service was made on him at both his Texas and California addresses (*See* Appendix 3 hereto).

At the hearing of the motion to dismiss before the Court of Appeal on May 11, 1967, Ronald H. Bonaparte, Esq. appeared and upon presenting a substitution of attorney with an application to be recognized was granted status as petitioner's counsel of record. After argument, the motion to dismiss was granted by an order of the court made on May 11, 1967 (*See* Exhibit C to the Petitions for Writs of Certiorari in Nos. 990 and 991).

Under Rule 24 of California Rules of Court, a decision of the Court of Appeal becomes final as to that

court thirty days after filing. Within this thirty-day period, a rehearing may be granted on petition (Rule 27, California Rules of Court, set forth in Appendix 4 hereto).

The petitioner failed to file a request for a rehearing by the Court of Appeal and therefore the decision of that court became final on or about June 10, 1967.

California appellate procedure allows a petition to be filed in the Supreme Court of the State of California within thirty days after a decision of a Court of Appeal becomes final as to that court (*See* Rule 28, California Rules of Court, set forth in Appendix 4 hereto). Within this thirty-day period the petitioner, by Gilbert F. Nelson, Esq., filed a petition for hearing with the California Supreme Court. The constitutionality of the dismissal by the Court of Appeal of the petitioner's appeal was not questioned, nor was any issue asserted concerning the constitutionality of any conduct on the part of the Superior Court with respect to the dismissal of the post-probate will contest. This can easily be seen from an examination of that petition which is part of the record before this Court. On July 5, 1967, the Supreme Court of the State of California denied the petition for a hearing.

On or about July 10, 1967, the thirty-day period within which the Supreme Court could have granted a hearing expired and the remittitur was issued in due course from the Court of Appeal. No appeal or petition to the United States Supreme Court was filed until more than five months from that date.[4]

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[4]The last day review could be sought in *this* Court from the dismissal of the will contest and the dismissal of the appeal

(This footnote is continued on the next page)

After the decision of the Court of Appeal had become final and the Supreme Court of the State of California had refused to review the Court of Appeal's decision, petitioner filed a petition to recall the remittitur addressed to the Court of Appeal, Second Appellate District, State of California.

In this petition *for the first time* the position was asserted that California Code of Civil Procedure Section 2034 as applied to the petitioner was unconstitutional, constituting a penalty and forfeiture in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States that would constitute the taking of property in violation of constitutional guaranties of the Fourteenth Amendment to the Constitution of the United States (*See* p. 21 of Petition to Recall the Remittitur).

California appellate procedure allows an appellant to request an appellate tribunal to reassert jurisdiction through recalling its remittitur in cases involving fraud or imposition practiced upon the appellate court, or if the judgment was rendered because of the appellate court's mistake of fact or lack of knowledge of the circumstances (*See* 3 Witkin, *California Procedure,* at 2370-73 (1954)). Petitioner failed to establish any such grounds for recall of the remittitur and his pe-

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therefrom was October 3, 1967, which was 90 days from the date the California Supreme Court denied the petition for hearing. *See Market St. Ry. Co. v. Railroad Comm'n.*, 324 U.S. 548 (1945) (dealing with the California Rules on Appeal). The petition for a writ of certiorari was thus first presented to this Court more than two months after the day that jurisdiction to entertain the petition expired. 28 U.S.C. § 2101(c). The order extending petitioner's time for filing his petitions was also made more than two months after this Court's jurisdiction expired.

tition was denied on July 27, 1967. Thereafter, a petition for a hearing by the Supreme Court of the State of California was requested and this also was denied on September 7, 1967.

D. Petitioner's Original Appellate Proceedings in Case Designated LA 29505.

Having failed in his direct effort to re-open his status as an appellant, the petitioner on September 5, 1967, filed a petition in the Supreme Court of the State of California which was entitled "Petition for Writ of Prohibition, Writ of Mandate and Any Other Appropriate Writ". By this petition, an effort was made to attack collaterally the validity of the final judgment of July 5, 1967, in 2nd Civ. No. 31472. The petitioner there made various allegations designed to raise questions under the Fifth and Fourteenth Amendments to the Constitution of the United States. Essentially, the position was asserted that the order striking the will contest for refusal to allow discovery was an unconstitutional deprivation of the party's right to a hearing.

The respondents filed opposition to that petition, pointing out serious factual discrepancies in the statement of the case, urging the proposition that the petition was a sham and frivolous effort to delay administration of the estate and pointing out the lack of substance in the constitutional question asserted. (*See* Opposition of Certain Real Parties in Interest to "Petition for Writ of Prohibition, Writ of Mandate and any other Appropriate Writ").

On October 11, 1967, the Supreme Court of the State of California, *en banc,* denied the petition without opinion.

III.

REASONS FOR DENYING THE WRIT.

A. No Substantial Federal Question Was Raised in the State Courts in Time to Be Properly Considered and Decided.

It is well settled that this Court will not pass on federal constitutional issues which were not timely raised in the state courts. *See, e.g., Beck v. Washington,* 369 U.S. 541, 553 (1962); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958); *Godchaux v. Estopinal,* 251 U.S. 179, 181 (1919).

The record before this Court shows that the first time petitioner asserted that the dismissal of the will contest (on the grounds of his refusal to give discovery) constituted a violation of the Constitution of the United States was in a petition to recall the remittitur. This petition was filed long after the dismissal of the will contest had become final and the time for rehearing had expired.

It would not be unfair to conclude that this contention of petitioner comes as an afterthought. It was not raised in the trial court where the entire matter of the dismissal of the will contest was extensively briefed. It was not raised in the Court of Appeal although petitioner had ample opportunity to do so, by brief, before the motion to dismiss the appeal was made. Even after being served with a notice of the motion to dismiss the appeal, petitioner had the opportunity to raise the federal question. Again he did not do so and in fact made no personal or written appearance before the Court of Appeal on the hearing of the motion, a circumstance which provided one basis for the dismissal

of the appeal. *See* California Rules of Court, Rule 41, set forth in Appendix 4 hereto.

Petitioner could have availed himself of another chance in the Court of Appeal to raise the federal question by filing a petition for rehearing but again he elected not to do so. The federal question was not raised in the Supreme Court of the State of California when the petitioner, this time through counsel, filed a petition for hearing.

State procedural rules govern the timeliness with which a federal question must be raised. As this Court stated in *Edelman v. California,* 344 U.S. 357 at 358 (1953):

> It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with requirements of state law (citing cases).

Accord, Barbour v. Georgia, 249 U.S. 454, 460 (1919); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291 (1903).

Under California law, the trial court is the place to raise constitutional issues if they are to be preserved and properly considered by the highest courts of the state. A recent California decision notes that:

> It is fundamental that issues or questions not raised or presented to the trial court will not be considered in the reviewing court.
>
> *Estate of Cunningham,* 148 Cal. App. 2d 8 at 13 (1957).

In *Jenner v. City Council,* 164 Cal. App. 2d 490 at 498 (1958) the court states:

> 'The right to question the constitutionality of a statute may be waived. It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.' (Citation)' (*Hershey v. Reclamation Dist. No. 108,* 200 Cal. 550, 564.)

See also, Dimmick v. Dimmick, 58 Cal. 2d 417 (1962); *Apra v. Aureguy,* 55 Cal. 2d 827 (1961); *Everly Enterprises, Inc. v. Altman,* 54 Cal. 2d 761 (1960); *Damiani v. Albert,* 48 Cal. 2d 15 (1957).

Even assuming that petitioner had raised his constitutional objections in a petition for rehearing in the Supreme Court of California, which he did not, it is well settled that the jurisdiction of this Court cannot attach unless the court to whom the petition for rehearing is directed actually entertains the petition and expressly decides the federal question. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *McGarrity v. Delaware River Bridge Comm'n.,* 292 U.S. 19, 20 (1934); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932).

If a federal question comes too late for purposes of this Court's review when raised for the first time in a petition for a rehearing, *a fortiori* it comes too late when raised *later,* for the first time, in a petition for the recall of the remittitur which was denied both in the Court of Appeal and in the Supreme Court of California without opinion.

It should be observed that the relief available on a motion to recall the remittutur is much more restricted

in scope than the relief available on a petition for a rehearing. The motion to recall the remittitur, while used in the case at bar as an attempt to review directly the judgment of dismissal of the will contest, properly extends only to cases where the judgment on appeal has been obtained upon a false suggestion, by fraud or imposition on the appellate court, or under a mistake by that court as to the facts of the case. *Isenberg v. Sherman,* 214 Cal. 722 (1932); *Rowland v. Kreyenhagen,* 24 Cal. 52 (1864). Thus, the issue before the court on the petition to recall the remittitur was whether the dismissal of the appeal because of the failure of petitioner to abide by established procedural rules was proper. It was not the question of possible constitutional error in the trial court.

The petition for extraordinary writs to the Supreme Court of the State of California, in LA 29505, was only a method to attack collaterally the judgment of dismissal of the will contest by the trial court and once again seek review of this decision in the appellate courts.[5] The granting of such writs is within the dis-

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[5]Petitioner himself admits that his petition in the California Supreme Court in LA 29505 is merely a method to attack collaterally the judgment of dismissal of the will contest in the trial court. *See* Petition for Writ of Certiorari in No. 990, October Term 1967, at 28.

Certainly, the decision in *Lund v. Superior Court,* 61 Cal. 2d 698 (1964) does not provide authority for the repetition of procedure indulged in by petitioner. It merely indicates that a petition for an extraordinary writ may be proper even though an appealable order is placed in question. The question of appealability was not expressly decided there because the court found that "[r]egardless of the *ultimate ability* to appeal, prohibition is an appropriate remedy to circumvent the imposition of sanctions. . . ." (61 Cal. 2d at 709, Emphasis added.) The decision does not intimate that after a party has exhausted all of the ordinary ap-

(This footnote is continued on the next page)

cretion of the court. A federal question is not timely when first raised in a petition asking a higher state court to exercise a *discretionary* power of review if such court declines to take jurisdiction. *El Paso & Southwestern R.R. Co. v. Eichel & Weikel,* 226 U.S. 590 (1913); Robertson & Kirkham, *Jurisdiction of the Supreme Court* 141 (Wolfson & Kurland ed. 1951).

Petitioner's belated attempt to raise the federal question in the matter at bar bears a marked similarity to the decision of this Court in *Loeber v. Schroeder,* 149 U.S. 580 (1893). In the *Loeber* case, the federal question was not raised until after a rehearing had been sought from the Court of Appeals of the State of Maryland. It was then raised in a motion to quash the *fieri facias* which issued after the judgment. This Court observed, at page 585 of 149 U.S.:

> The motion to quash the *fi. fa.* in this case on the grounds that the order of the court of appeals, which directed it to be issued, was void for the reasons assigned, stood upon no better footing than a petition for rehearing would have done, and suggested Federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the court of appeals was rendered on January 28, 1892.
>
> If any Federal question existed in the case the attempt to raise it came too late, . . .

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pellate proceedings, he may start anew by requesting review through a petition for an extraordinary writ.

Moreover, the case of *Crummer v. Beeler,* 185 Cal. App. 2d 851 (1960) demonstrates that an appeal is the proper, ordinary and adequate procedure for review where, as at bar, failure to make discovery results in a final judgment against the appealing party.

B. The Decision of the State Court on the Petition for Extraordinary Writs Was Based on Adequate Non-Federal Grounds.

The Supreme Court of the State of California denied, without opinion, the petition for extraordinary writs. Even assuming that the federal question was properly raised in this post-judgment proceeding, where, as here, there is a denial without opinion, this Court should presume that the decision of the California court was based on non-federal grounds which, as seen below, were adequately raised in the record.

This Court has long held that there must be an affirmative showing on the record that a federal question was both presented to a state court *and* was necessarily decided by that court in dealing with the cause. Where this is not clearly indicated, especially because of the presence of an adequate non-federal ground, jurisdiction will be denied. *See, e.g., Lynch v. N. Y. ex rel. Pierson,* 293 U.S. 52, 54-5 (1934).

The granting of extraordinary writs is discretionary in the appellate courts of California. There is no *right* to such review as there is with an appeal after a judgment.

The record before the Supreme Court of California in LA 29505 shows that respondents pointed out serious factual discrepancies in petitioner's statement of the case. In addition, respondents urged that this matter had already been adequately dealt with by the Court of Appeal and the Supreme Court in connection with the appeal from the dismissal of the will contest. Under the doctrine of law of the case, the matter was settled for purposes of California law and not open

once again to appellate review. *See, e.g., Pigeon Point Ranch Inc. v. Perot,* 59 Cal. 2d 227 (1963). Also, respondents urged that the petition for extraordinary writs was a sham and merely a dilatory effort to frustrate the distribution of the estate assets.

Since the Supreme Court of California delivered no opinion on denying the petition for extraordinary writs, it is to be presumed that these non-federal grounds were the basis of its decision. *See, e.g., Woods v. Nierstheimer,* 328 U.S. 211 (1946).

Petitioner here has not met his burden to demonstrate why the state grounds referred to above cannot account for the decision in the state courts. That burden is not met if it appears that the judgment of the state courts *might* have rested upon a non-federal ground. *Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952); Rule 23(f), Rules of the Supreme Court of the United States.

There can be no doubt that the state grounds identified above are adequate to support the decision of the California Supreme Court. They are certainly broad enough, without reference to the alleged constitutional question, to sustain this decision. They are also clearly independent of the alleged constitutional question and are certainly tenable, since these state grounds were not designed to prevent review of a federal question.

Since the purported federal question was not dealt with and was not necessary to support the decision of the state court, the instant petition should be denied for this reason alone.

C. Petitioner Was in No Way Denied Due Process of Law by the Courts of the State of California.

(i) Section 2034 of the California Code of Civil Procedure, as Written, and as Applied to the Facts of the Case at Bar, Comports With Existing Constitutional Principles.

A review of the "Questions Presented" portion of the two petitions for writs of certiorari in Nos. 990 and 991 indicates that the gravamen of petitioner's alleged constitutional error is that the dismissal of his will contest by the trial court was improper.

However, the dismissal of the will contest was based on the findings of fact (Appendix 2 hereto) which clearly demonstrated petitioner's many flagrant violations of the discovery rules, including *direct interference with discovery sought from independent non-party witnesses.*[6] These violations betrayed a lack of merit in the will contest.

Petitioner himself dismissed the pre-probate will contest. It was with regard to this contest that he had admitted, in a deposition, that he had *no evidence* to support the allegations there made. *See* Appendix 2 hereto.

The post-probate will contest was virtually identical with petitioner's pre-probate contest. Petitioner's course of conduct after filing this post-probate contest confirmed, by implication, the express admissions he had previously made disclosing the absence of a meritorious position. Thus the trial court, acting on the authority of California's discovery statutes, reasonably concluded

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[6]Findings of fact by state courts are accepted, without question, by this Court. *Grayson v. Harris,* 267 U.S. 352, 358 (1925).

that petitioner had no basis for a will contest of any kind.

The constitutional question of a court's power to default a contumacious litigant, or to dismiss his suit, was settled by this Court in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909). The *Hammond* case was a prosecution under state anti-trust laws in which the appellant was ordered to produce certain named employees for the taking of their depositions and to make available for inspection various books, records, and documents. The appellant refused to comply and subsequently his answer was stricken and judgment entered by default. On appeal the contention was made by appellant that striking his answer and entering a default judgment was a denial of due process of law. The court clearly disagreed by saying:

> This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this,

is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.

. . . .

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation. 212 U.S. at 350.

Recent federal cases applying the *Hammond Packing Co.* decision include *Peitzman v. Illmo,* 141 F. 2d 956 (8th Cir. 1944), which affirmed the default judgment holding the appellant liable for breach of contract upon his refusal to appear for the taking of his deposition. Another such case is *Fong v. United States,* 300 F. 2d 400 (9th Cir. 1962), *cert. denied,* 370 U.S. 938, which involved a refusal to respond to a notice to take appellant's deposition and a court order to appear. A motion to strike appellant's answer and order him in default for his failure to attend deposition examinations

was granted. This was upheld on appeal because the court found the appellant's failure to appear was willful.

In the leading California case, *Unger v. Los Angeles Transit Lines,* 180 Cal. App. 2d 172 (1960), the striking of an answer and entry of default pursuant to Code of Civil Procedure Section 2034 was upheld as constitutional. In explaining how Section 2034 of the California Code of Civil Procedure comports with the constitutional principles regarding due process of law, the court quoted, with approval, from Moore's *Federal Practice* as follows:

> 4 Moore's Federal Practice (2d Ed.) § 37.03, page 2805, speaking of the federal counterpart of our discovery statute, summarizes the effect of the authorities, saying: "In its Note to Rule 37 the Advisory Committee points out that a distinction must be made between the justifiable use of orders of this sort as a means of compelling the production of evidence, and their unjustifiable use for the mere purpose of punishing for contempt. The two landmark cases on this question are *Hammond Packing Co. v. Arkansas,* decided by the Supreme Court in 1909, and the Court's earlier decision in *Hovey v. Elliott.* The *Hovey* case establishes that it is a denial of due process of law to punish a party for contempt by striking his answer from the files and rendering a default judgment against him. The *Hammond* case, however, makes it clear that a defendant's answer may be stricken and default judgment entered for failure to secure attendance of witnesses and to produce documents; the Court's theory was that 'the

> preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.' In most cases there will be no difficulty in determining which of these two decisions is controlling." 180 Cal. App. 2d at 187,

Since petitioner's refusal to give discovery was held to be willful and since he was given every opportunity to give his deposition, produce documents and answer interrogatories, it can readily be seen that the order dismissing his amended will contest was not made to punish him but was rather made as a necessary means to compel discovery. It is therefore proper under the statutes of California and the constitutional tests set forth in the foregoing authorities.

In the petition before this Court, the cases of *Hovey v. Elliott,* 167 U.S. 490 (1897) and *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197 (1958) are cited evidently in support of the contention that the trial court denied petitioner due process of law in dismissing his will contest. The *Hammond* case is conspicuously absent from the petition, possibly because it provides the applicable rule for this case, to wit: that due process is preserved by presuming that the refusal to produce material evidence is an admission of lack of merit.

The *Hovey* case is clearly distinguishable since it involved solely punishment for contempt. Similarly, the *Societe Internationale* case is distinguishable as involving an order of dismissal despite a finding of a good faith inability to comply on the part of the party failing to produce certain records. In contrast, there is

no indication in the case at bar of an attempt to punish for contempt or that petitioner acted in any way other than in a willful, contumacious manner and with a complete lack of good faith in ignoring the several discovery orders made by the trial court.

In circumstances where a party willfully and persistently refuses to participate in the discovery process, due process of law to his opponent can be served only by dismissing the recalcitrant party's suit. No party to a lawsuit can realize due process where one party denies the flow of information necessary to trial preparation and thereby a fair trial to the other. The legislature must be free to empower courts to maintain, effectively, the orderly administration of justice. As applied in the case at bar, the dismissal was the only fitting, practical and proper solution to a situation where petitioner refused to abide by established procedural rules after having expressly and by his actions admitted his cause had no foundation in evidentiary fact.

(ii) No Fraud, Extrinsic or Otherwise, Was Practiced on the Trial Court, on the Appellate Courts or on Petitioner.

The alleged extrinsic fraud concerning the "Certificate of Readiness", which apparently is the basis of the petitioner's seventh "Question Presented", is a shopworn contention thoroughly argued and considered by the California courts in the matter at bar.

There is no merit in the allegation or insinuation that the trial court, the appellate courts or the petitioner were misled by the "Memorandum for Setting Contested Action and Certificate of Readiness" which

has been included as "Appendix D" of the Petition to Recall the Remittitur. Petitioner has contended that on July 22, 1965, in this document (Appendix D), the respondents "set forth that all discovery has been made. . . ." (*See* Petition for Writ of Prohibition, etc. at 8).

This Court should notice the following:

(a) The form ("Appendix D") was marked to indicate that it concerned a type of case for which pretrial was not required;

(b) The stamped date of filing of the form was July 22, 1965; and

(c) The printed representations concerning readiness for pretrial and also as to whether discovery had been completed, were clearly deleted by "X-ing" out this language.

The circumstances concerning the preparation and presentation of this form by Ernest J. Zack, Esq., on behalf of respondents, was explained in the statement made on October 5, 1964, reported in the transcript attached to the Petition for Writ of Prohibition, etc. as "Exhibit Q". *See* pages 22-3 and page 71, lines 9-18 of said "Exhibit Q".

In brief, because the action involved a will contest, no pretrial was required and therefore representations concerning completion of discovery were not required and the form constituted nothing more than a memorandum requesting a trial setting.

That petitioner was not misled is seen from a stipulation (*See* Clerk's Transcript at 219 in 2nd Civ. No. 31472), signed by Phill Silver, Esq., who was then attorney of record for the petitioner, which was filed

on August 23, 1965. It demonstrates that nearly a month after the filing of the so-called "Certificate of Readiness", the petitioner unqualifiedly acknowledged a Notice of Deposition and stipulated to its continuance until September 1, 1965.

Thus from the foregoing record, it clearly appears that the "Certificate of Readiness" did not contain any representations that discovery had been completed and therefore there was no fraud, extrinsic or otherwise. Moreover, it can be seen that Judge Wright, with regard to the Motion to Dismiss, directly considered the nature and effect of the "Certificate of Readiness" and ruled adversely to the petitioner.

This same explanation, the stipulation and the trial court's direct consideration of the "Certificate of Readiness" was in the record before the California appellate courts. Their actions were thus based on a full consideration of all aspects of this matter.

(iii) Petitioner Was Given Every Reasonable Opportunity to Be Heard on the Merits of His Claims.

Petitioner, by dismissing the pre-probate will contest, prevented his claims from being heard on their merits.

This dismissal came at the last minute, just prior to the hearing on the admission of the will to probate. Petitioner clearly had notice of this hearing and had an opportunity to contest, which he chose not to take.[7]

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[7]Petitioner was present himself during the hearing on the admission of the will to probate. Although given numerous opportunities to cross-examine the witnesses called in support of the will, he declined to so do. More significantly, petitioner, although an attorney at law admitted to the California bar, made no objection concerning foundations for the testimony of witnesses, nor did he there contend that there was something wrong wth the date of subscription of the will, or that the will was allegedly a product of undue influence.

Petitioner's post-probate will contest was virtually an exact copy of his prior contest. As outlined herein, petitioner, both directly and through counsel, thwarted all attempts by respondents to secure some inkling of the factual basis for his post-probate contest. Since his pre-probate contest was *admittedly* without foundation, such efforts were entirely reasonable.

Some indication of the efforts of petitioner to evade having to admit under oath that his post-probate contest also was without merit can be gained from the remarks of Judge Wright, made after an afternoon of argument by counsel for both petitioner and respondents on the motion to dismiss the post-probate will contest. Judge Wright observed:

> As I mentioned at the opening of this hearing, I spent a considerable amount of time going over all of the recent proceedings and pleadings that have been filed in this matter. I also reviewed in their entirety, although most assuredly not minutely, the entire files. We are now on Volume 4, I believe.
>
> I want it clearly understood, first of all, that any order I make is not based upon a perusal of the file but is based simply upon the legal issue which is before this court as to whether or not the relief should be granted because of conduct persisted in by counsel for contestant, and in some respects the contestant himself.
>
> . . . .
>
> I do feel that in my some thirty-three years a a lawyer and a judge that I have never seen a more blatant case where counsel prohibited and prevented discovery from taking place. In my own

humble opinion, it is simply an example of how you can make a mockery out of the law if you are tenatious enough, and tenacity is just what it is.

I feel that there is no other appropriate remedy than to order the contest to be dismissed, and I so rule, because of the willful disobedience to orders and the refusal to comply with orders of this court in connection with discovery proceedings.

Worthy of note, although in no way affecting my decision, is that I read the original will contest before probate and I noted that it came clear up to trial when the contestant dismissed the same on his own motion; I noted that he waited almost until the expiration of the statutory time and then he filed another contest after probate, and I could see little or no difference whatsoever from the one that he had voluntarily dismissed. He turned right around and filed the same document again, or essentially the same document. It was, of course, cured later by demurrers. But I never have seen a case where an estate has been so fraught with litigation. Just look at the size of those files.

I do note that Mr. Joslyn has had eight attorneys now in this matter. He not only does that but he writes to me personally and is condemning his counsel because they don't get an accounting by a certified public accountant.

The dismissal is the only way that the matter can properly be handled and so, as I have indicated, based only upon the legal grounds which are set forth, on the contestant's willfulness the willful disobedience, which is nothing short of bla-

tant, the will contest is hereby dismissed. (Petition for Writ of Prohibition, Exhibit Q at 74-6).[8]

Petitioner's contentions that he lacked notice of the various proceedings, that he wasn't heard, that the amended will contest as opposed to the "will contest" was dismissed without hearing, and that there was no testimony to support the dismissal of the will contest are without factual foundation.

Petitioner's sixth "Question Presented" suggests that he had no notice or opportunity to be present when the *amended* will contest was dismissed. The foregoing excerpt from the record shows the extensive consideration given by the trial judge to the motion seeking a dismissal of the will contest. The record also clearly shows that neither the court nor petitioner's counsel were confused concerning the fact that the post-probate will contest was amended after having been filed. It further shows that petitioner was represented by a lawyer at the hearing, who had received sufficient notice to prepare and file an extensive declaration in opposition to the motion to dismiss.[9] Thus it appears that the allegations concerning lack of notice and an opportunity to be heard find no support in the record.

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[8]The suggestions, in the Petitions for Writs of Certiorari in Nos. 990 and 991, especially at 27, to the effect that improper influence was exerted on the California courts by counsel for respondents, is a slur both on these courts and upon counsel for respondents. *The record does not in any way, even remotely, support these statements by petitioner.* They should be stricken pursuant to Rule 40 of this Court.

[9]Petitioner's suggestion that California Probate Code § 1200 was violated in some manner is likewise without foundation. That section, by its terms, is limited to certain listed probate petitions and reports, *not* including will contests or any proceedings in connection therewith. These matters are governed, in California, by the Code of Civil Procedure. In any event, the trial court found expressly and by implication, that all notices had been properly given or waived by petitioner. *See* Appendix 2 hereto.

Petitioner, himself, supplemented his attorney's declaration of fact with a lengthy affidavit of fact in support of his motion to reconsider the dismissal of his will contest. Accordingly, his suggestion that the trial court's dismissal of the will contest was "not based on any testimony" also finds no support in the record.

The record also indicates that petitioner was personally served with notice of the motion seeking a dismissal of his appeal from the trial court's action.

The record, then, does not support an inference that petitioner was denied a hearing on the merits of his will contest, at any stage, in the courts of California. The record does compel the conclusion that there was a full opportunity afforded petitioner to present any case he might have. He chose, however, to dismiss one contest and then to impliedly admit, by his actions, that his second contest was similarly devoid of merit.

IV.

CONCLUSION.

The petition for a writ of certiorari should be denied because the record shows that no federal or constitutional question was raised until *after* orders dismissing the will contest by the Superior Court, Court of Appeal and Supreme Court of the State of California had become final. Further, the decisions in the appellate court were based on adequate non-federal grounds.

The record also shows that the petitioner, in effect, confessed the lack of merit in his will contest by refusing to allow discovery and by interfering with the efforts by the estate representatives to secure discovery from witnesses. By reason of the petitioner's will-

ful refusal to obey discovery orders, the Superior Court of Los Angeles County eventually directed that his will contest be dismissed. This order was made pursuant to the provisions of Section 2034 of the Code of Civil Procedure of the State of California. The validity of statutes such as this, as written and applied, have been upheld by the Supreme Court of the United States. As applied in the case at bar, no constitutional rights of petitioner were infringed.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

February 1, 1968.

Respectfully submitted,

JAMES H. KINDEL, JR.,
JOHN W. ARMAGOST,
By JOHN W. ARMAGOST,
Counsel for Respondents and Real Parties in Interest, Merritt L. Joslyn, Mary C. Parker Currivan, Roland Merritt Joslyn, Joy Louise MacNulty, Joylon David Joslyn, Theodore Newell Joslyn, Celia Alice Parker, M. Wesley Parker, III, Marcellus Joslyn Parker, Alice Joslyn, William Dwight Joslyn, Penny Irene Joslyn, Marcellus LeFevre Joslyn, Marina Elaine Joslyn, Lois E. Mendenhall, Mrs. Mary R. Shoff Carey, Marcia Harriet Joslyn Sill, Robert F. Dolan, and Robert D. MacDonald, Individually and as Executor of the Last Will of Marcellus L. Joslyn, Deceased.

Of Counsel:
KINDEL & ANDERSON